

² For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case was previously before the Board. By decision dated July 2, 2012, the Board affirmed an August 11, 2011 nonmerit OWCP decision which denied appellant's request for reconsideration under 5 U.S.C. § 8128(a). The Board also affirmed a September 7, 2011 nonmerit decision denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.³ The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On October 11, 2012 appellant filed a request for reconsideration before OWCP.

By letter dated October 11, 2012, appellant's attorney argued that the request for reconsideration was timely filed on May 12, 2011 and accompanied with new and relevant evidence in the form of a January 5, 2007 magnetic resonance imaging (MRI) scan report, a January 16, 2007 office note and a June 2, 2008 surgical report. He stated that he spoke with the senior claims examiner on August 15, 2011, who informed him that the reports were of record.⁴ Counsel argued that OWCP's September 7, 2011 decision noted that appellant's August 19, 2011 appeal was not within a year of the May 27, 2010 decision. He argued that the appeal was timely because he had previously sent in a letter on May 12, 2011. Counsel further noted that OWCP's system and scanning process was flawed as there were missing documents. He concluded that the medical reports of Dr. Shabir Bhayani, a Board-certified orthopedic surgeon, dated November 24, 2009 and September 20, 2011 supported appellant's claim.

In a November 24, 2009 medical report, Dr. Bhayani reported that appellant complained of continued left shoulder pain postsubacromial decompression and distal clavicle resection.⁵ He stated that "lifting of the box which would require abduction-rotation of the shoulder is a mechanism that would cause an impingement syndrome and as such is causally related. The

³ Docket No. 12-90 (issued July 2, 2012). On October 9, 2007 appellant, then a 57-year-old postmaster relief, filed a traumatic injury claim (Form CA-1) alleging that she developed a left shoulder injury on October 6, 2007 when she picked up an oblong box off the floor with her left arm. By decisions dated March 5, 2008, March 12 and November 17, 2009 and May 27, 2010, OWCP denied her claim finding that the medical evidence of record failed to establish that her left shoulder condition was causally related to the October 6, 2007 employment incident.

⁴ An August 16, 2011 OWCP telephone memorandum noted that appellant's counsel was concerned that a June 2, 2008 operative report did not accompany the reconsideration request. The claims examiner noted that she was unable to locate the report.

⁵ The Board notes that Dr. Bhayani's medical report was submitted after OWCP rendered its September 7, 2011 decision and during the pendency of the Board's prior appeal. The additional evidence was not considered as the Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

factors of employment that can cause abduction-rotation-type stresses on the shoulder can also cause impingement syndrome and she was treated at our office based on those assumptions.”

In a September 20, 2011 medical report, Dr. Bhayani reported that he was attempting to provide clarification regarding appellant’s October 6, 2007 work-related injury. He stated that appellant injured her left shoulder while lifting a box. This activity caused appellant’s injury based on the abduction and rotation required by lifting. Dr. Bhayani reported that appellant had been doing well with regard to the left shoulder prior to that visit. A January 5, 2007 MRI scan did not show any tears while the arthroscopy done on June 2, 2008 showed an anterior-superior labral tear. Dr. Bhayani concluded that there was no other basis or cause in her history to explain the tear that occurred after her original MRI scan other than her work-related injury and as such, was causally related to her October 6, 2007 work-related injury.

By decision dated October 26, 2012, OWCP denied appellant’s reconsideration request as untimely filed and failing to establish clear evidence of error.⁶

LEGAL PRECEDENT

To be entitled to a merit review of OWCP’s decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁸

OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.⁹

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.¹⁰

⁶ The Board notes that appellant submitted additional evidence after OWCP rendered its October 26, 2012 decision. The Board’s jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, *supra* note 5; *James C. Campbell*, *supra* note 5. Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

⁸ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

In its October 26, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. An application for reconsideration must be sent within one year of the date of OWCP's decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ As appellant's October 11, 2012 request for reconsideration was submitted more than one year after the date of the last merit decision of record on May 27, 2010, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁷

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In support of her request for reconsideration, appellant submitted two medical reports not previously considered from Dr. Bhayani dated November 24, 2009 and September 20, 2011. In his November 24, 2009 report, Dr. Bhayani stated that "lifting of the box which would require abduction-rotation of the shoulder is a mechanism that would cause an impingement syndrome and as such is causally related. The factors of employment that can cause abduction-rotation-type stresses on the shoulder can also cause impingement syndrome and she was treated at our office based on those assumptions." In his September 20, 2011 report, Dr. Bhayani reported that he was attempting to provide clarification regarding appellant's October 6, 2007 work-related injury. He stated that appellant injured her left shoulder lifting a box which he opined caused her injury based on the abduction and rotation required in that lifting activity. A January 5, 2007 MRI scan did not show any tears; however, the arthroscopy done on June 2, 2008 showed an anterior-superior labral tear. Dr. Bhayani concluded that there was no other basis or cause in appellant's history to explain the tear that occurred after her original MRI scan other than her work-related injury and as such, was causally related to her October 6, 2007 work-related injury.

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ *Id.*

¹⁴ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁵ *Supra* note 9.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

¹⁷ *See Debra McDavid*, 57 ECAB 149 (2005).

This evidence, however, is insufficient to establish that OWCP erred in its denial of appellant's claim.¹⁸ The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence, such as a detailed well-rationalized medical report, which if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.¹⁹ While the reports of appellant's physician are supportive of her claim, they do not establish clear evidence of error on the part of OWCP as they were submitted after OWCP's May 27, 2010 merit decision and the August 11, 2011 nonmerit decision denying appellant's request for reconsideration.²⁰ Thus, Dr. Bhayani's report does not raise a substantial question as to the correctness of OWCP's May 27, 2010 merit decision or demonstrate clear evidence of error.²¹

On appeal, appellant's counsel requested that the Board also review a June 2, 2008 surgical report and a January 5, 2007 MRI scan report which document that appellant's left shoulder tears were not present before the October 6, 2007 employment incident. The Board notes that these documents were previously submitted and are duplicative of evidence already reviewed in its prior decision issued July 2, 2012.

The Board also notes that appellant's counsel submitted an October 11, 2012 letter raising issues with the prior OWCP decisions. Counsel argued that appellant submitted sufficient medical evidence to support causal relationship between her diagnosed shoulder condition and the October 6, 2007 employment incident, the appeal was timely filed, medical reports were timely submitted and that OWCP failed to properly receive and scan the documents. Appellant, however, has not provided any evidence to establish that these documents were submitted in a timely manner.²² Moreover, these arguments had been presented on numerous prior occasions and are not sufficient to establish clear evidence of error. The Board has previously addressed these arguments in its July 2, 2012 decision.²³

Counsel's contentions do not establish clear evidence of error. As the underlying issue is medical in nature, the medical evidence submitted was not sufficient to shift the weight of the evidence in appellant's favor and establish that OWCP erred in denying her claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

¹⁸ See *W.R.*, Docket No. 09-2336 (issued June 22, 2010).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (March 2011).

²⁰ *V.W.*, Docket No. 12-1901 (issued March 5, 2013).

²¹ Docket No. 12-90 (issued July 2, 2012).

²² *G.D.*, Docket No. 07-11-1 (issued September 11, 2007).

²³ Docket No. 12-90 (issued July 2, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 26, 2012 is affirmed.

Issued: May 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board